

Via ECFS
October 1, 2015
Marlene H. Dortch
Secretary
Federal Communications Commission

Re: Ex Parte Communication of Brent Skorup; In the Matter of Implementation of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test, MB Docket No. 15-216; Amendment to the Commission's Rules Related to Retransmission Consent, MB Docket No. 10-71

Dear Ms. Dortch:

On September 29, 2015, Taylor Barkley and I met with Matthew Berry, Chief of Staff to Commissioner Ajit Pai, to discuss the Commission's proposal to eliminate the broadcast exclusivity rules¹ and inquiry into what constitutes good faith in retransmission negotiations.²

During the meeting we discussed how copyright law and communications law interact and the effects of repeal of the broadcast exclusivity rules. I explained that, for several reasons, the repeal of the exclusivity rules is likely to have only modest effects on the operation of copyright law and is unlikely to result in frequent importation of distant broadcast signals.

Should the FCC repeal the exclusivity rules, importation of a distant network signal will continue to be an onerous endeavor. First, in the event of a standoff with a local affiliate, an MVPD would need to negotiate retransmission consent with a distant network station. (Since, according to the Congressional Research Service, most of these private network-affiliate agreements seem to preclude granting such retransmission, even entering negotiations with a distant station would be uncommon.³) This is often costly and also could be time consuming.

Second, in addition to any retransmission consent payments, an MVPD importing a distant signal would face distant signal royalty payments from the Copyright Office.⁴ Further, if history is any indication, the Copyright Office is likely to raise the rates charged for distant signals if the FCC repeals the exclusivity rules. When the FCC repealed distant signal importation and syndicated exclusivity rules in 1981, the Copyright Office proceeded to raise the royalty rates for distant signals in order to compensate copyright owners for possible financial loss.⁵

Third, importing a distant signal is unlikely to be a great short-term strategy in a retransmission standoff. Once again, costs mount because if a cable operator reaches an agreement with a distant station and imports a distant signal for even a few hours, the cable operator must pay royalties for the signal as if it had been carried for six months.⁶

¹ Amendment of the Commission's Rules Related to Retransmission Consent, *Report and Order and Further Notice of Proposed Rulemaking*, 29 FCC Rcd 3351 (rel. Mar. 31, 2014).

² In the Matter of Implementation of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test, *Notice of Proposed Rulemaking*, MB Docket No. 15-216, FCC 15-109 (rel. September 2, 2015).

³ Charles B. Goldfarb, "Localism": Statutes and Rules Affecting Local Programming on Broadcast, Cable, and Satellite Television, CRS-14 (Jan. 25, 2005) (... "frequently these [network-affiliate] contracts effectively preclude retransmission consent.").

⁴ 17 USC §§ 111, 119.

⁵ US Copyright Office, *Satellite Home Viewer Extension and Reauthorization Act Section 109 Report* (Washington, DC: US Copyright Office, 2008), 6-8, <http://www.copyright.gov/reports/section109-final-report.pdf>.

⁶ *Id.* at 118 ("[I]f a cable system imports a distant signal for even a portion of one day in any given semiannual accounting period, then it must pay for that signal as if it were carried for the entire six month period.").

Finally, assuming an MVPD is willing to bear all of these costs, an MVPD faces another potential problem when importing a distant signal: subscriber dissatisfaction. People prefer their local news, weather, and sports and distant network signals are, at best, an imperfect substitute for local signals. Chicago viewers don't want to receive Los Angeles weather forecasts, nor would they be much happier receiving Quad City or Milwaukee crime news and traffic updates.

I explained that I'd rather the FCC repeal the rules because they are the expert agency and therefore in a better position than members of Congress to devote time to this issue and understand the effects of repeal. The repeal of the exclusivity rules would eliminate one more complex, inter-Committee, sticking point when Congress updates US video regulations.

Copyright owners of broadcast content are rightfully concerned about being underpaid via the statutory copyright licenses for their content if the FCC repeals the exclusivity rules. However, I raised the point that it may be the case that copyright owners can negotiate with satellite and cable operators to opt out of the Section 111 and Section 119 statutory licenses and be paid fairly for their content. While I am unaware of any parties that have opted out, the Copyright Office seems to leave open that possibility,⁷ and the FCC should investigate this option further.

Regarding the FCC's related inquiry into the FCC's test for good faith in retransmission consent, I expressed that I do not think it prudent to consider exclusivity as a factor in determining when a party has breached its duty to negotiate in good faith. Many industries that employ affiliates and franchises use geographic exclusivity agreements to distribute their products and services in ways that benefit consumers. Certainly these exclusivity agreements can raise competition problems, but the presence and exercise of these contractual rights is a poor indicator of whether a party is acting in good faith.

As the Copyright Office has said, there is "a thicket of communications law requirements aimed at protecting and supporting the broadcasting industry."⁸ It is encouraging that the FCC is considering clearing away part of the regulatory thicket. Mass media is a competitive and dynamic market and the FCC should free all television distributors from obsolete regulations. Pay TV in particular is much more competitive than it was when the exclusivity rules were created and, in my view,⁹ the rules are distorting competition and unnecessarily raising costs to television and broadband providers.

This letter is being filed electronically pursuant to section 1.1206 of the Commission's rules.

Respectfully submitted,

Brent Skorup

cc: Matthew Berry

⁷ US Copyright Office, Satellite Television Extension and Localism Act Section 302 Report (Washington, DC: US Copyright Office, 2011), 35-36, <http://www.copyright.gov/reports/section302-report.pdf> ("The provisions of Sections 111, 119 and 122 are often referred to (and copyright owners certainly perceive them to be) 'compulsory' licenses because copyright owners cannot opt out of the regime *absent the consent of the cable operators and satellite carriers.*") (emphasis added) (citation omitted).

⁸ US Copyright Office, Satellite Home Viewer Extension and Reauthorization Act Section 109 Report (Washington, DC: US Copyright Office, 2008), 65, <http://www.copyright.gov/reports/section109-final-report.pdf>.

⁹ Brent Skorup, Reply Comment, In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent, MB Dkt. No. 10-71 (July 24, 2014), <http://apps.fcc.gov/ecfs/comment/view?id=6018237200>.